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Defendants.

(Motion to Strike #139)

On January 19, 2012, plaintiff filed a motion to amend complaint. (#24). On January 26, 2012, plaintiff filed an opposition to defendant Bradley's motion to dismiss. (#31). On February 1, 2012, defendant Bradley filed a reply in support of her motion to dismiss (#33) and an opposition to plaintiff's motion to amend complaint (#34). The Iantuono Defendants filed a joinder to defendant Bradley's opposition (#35), and plaintiff filed a reply in support of his motion (#37). On February 17, 2012, the

1 AP Express Defendants filed a discovery plan and scheduling order without plaintiff's participation.  
2 (#39). The court signed the discovery plan (#40) and issued an order setting an order to show cause  
3 hearing so that plaintiff could show cause why sanctions should not be imposed for his failure to comply  
4 with LR 26-1(d) (#41).

5 The AP Express Defendants and plaintiff filed a joint status report on March 1, 2012, and the  
6 court vacated the show cause hearing. (#42 and #43). On March 16, 2012, defendant Michelle Pont  
7 filed an answer to the complaint. (#49). On April 4, 2012, the court entered an order denying defendant  
8 Bradley's motion to dismiss as moot (#13) and granting plaintiff's motion to amend complaint (#24).  
9 (#53). On April 25, 2012, plaintiff filed his amended complaint. (#55). On April 26, 2012, defendant  
10 Stuart filed her answer to the complaint (#54), and on May 8, 2012, defendant Stuart filed her answer  
11 to the amended complaint (#60).

12 On May 10, 2012, defendant Bradley filed a motion to dismiss the amended complaint. (#61).  
13 On May 15, 2012, Michelle Pont filed a notice of objection to deposition. (#63). On May 16, 2012,  
14 defendant Bradley filed a motion for protective order and for attorneys' fees. (#66). On May 25, 2012,  
15 the AP Express Defendants filed a motion to strike amended complaint, or in the alternative, to dismiss  
16 amended complaint. (#69). Plaintiff filed an opposition to defendant Bradley's motion to dismiss on  
17 May 29, 2012. (#71). On the same day, defendant Manuel Carranza filed a motion to dismiss. (#72).  
18 On May 30, 2012, defendant Michelle Pont filed a joinder to the AP Express Defendants' motion to  
19 strike/dismiss amended complaint (#69). (#75). On May 30, 2012, the AP Express Defendants filed  
20 an *emergency* motion to stay discovery, or in the alternative, for a protective order and to quash  
21 subpoena. (#76).

22 On June 4, 2012, defendant Bradley filed a joinder to the AP Express Defendants' motions for  
23 stay (#77) and to strike/dismiss (#78). On June 5, 2012, defendant Stuart filed a non-opposition to the  
24 AP Express Defendants motion to stay discovery. (#79). On the same day, plaintiff filed an opposition  
25 to defendant Bradley's motion for protective order. (#81). On June 6, 2012, defendant Carranza filed

1 a joinder to defendant Bradley's motion to dismiss (#82) and a non-opposition to the AP Express  
2 Defendants' motion to stay discovery (#83). On June 7, 2012, Defendant Bradley filed a reply in  
3 support of her motion to dismiss. (#85). On June 11, 2012, plaintiff filed an opposition to the AP  
4 Express Defendants' motion to strike (#88), and on June 14, 2012, plaintiff filed an opposition to  
5 defendant Carranza's motion to dismiss (#92). Defendant Bradley filed an objection to her deposition  
6 on June 14, 2012. (#91).

7 On June 15, 2012, defendant Bradley filed a reply in support of her motion for protective order  
8 (#93) and the AP Express Defendants filed a reply in support of their motion to strike (#95). On June  
9 18, 2012, plaintiff filed an opposition to the AP Express Defendants' motion to stay discovery. (#98).  
10 On June 19, 2012, the AP Express Defendants filed an objection to plaintiff's second notice of  
11 deposition of Jeffrey Pont. (#97).

12 On June 21, 2012, the AP Express Defendants filed a reply in support of their motion to stay  
13 (#102) and defendant Carranza filed a reply in support of his motion to dismiss (#104). On June 27,  
14 2012, the court issued an order granting in part and denying in part defendant Bradley's Motion for  
15 Protective Order Against Michael Foley and Request for Attorneys' Fees and Costs (#66) and the AP  
16 Express Defendant's Motion for Stay of Discovery, Or In the Alternative, Motion for Protective Order  
17 and To Quash Subpoena (#76). (#106). The court stayed the action pending further order from the  
18 court, and held that "[w]ithin fifteen (15) days from the entry of the court's rulings on defendants'  
19 motions to dismiss (#61, #69 and #72), the remaining parties shall hold a Rule 26(f) conference and file  
20 a discovery plan and scheduling order pursuant to LR 26-1(d)." *Id.* On June 27, 2012, plaintiff filed  
21 a supplemental response to the AP Express Defendants' motion to strike/dismiss (#69). (#107). On  
22 July 2, 2012, the AP Express Defendants filed a surreply to plaintiff's supplemental response (#107).  
23 (#109).

24 On August 7, 2012, defendant Georgina Stuart filed a motion/request for *in camera* inspection  
25 (#114) and a motion for summary judgment (#115). Plaintiff Foley file an opposition to the  
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1 motion/request on August 24, 2012. (#117). The court entered a 4(m) notice of intent to dismiss as to  
2 John T Kelleher, Nikki Dupree, and Kelleher & Kelleher. (#118). Plaintiff filed an opposition to  
3 defendant Stuart's motion for summary judgment on August 31, 2012. (#120). Defendant Stuart filed  
4 a reply in support of her motion/request on September 4, 2012. (#121). On September 14, 2012,  
5 plaintiff filed a motion for entry of clerks default (#122) and a request for judicial notice (#123). The  
6 clerk entered default as to Juan Carlos Valdes on September 17, 2012. (#124). Defendant Stuart filed  
7 a reply in support of her motion for summary judgment on September 17, 2012. (#125). Plaintiff filed  
8 a response to the 4(m) notice of intent to dismiss on October 1, 2012. (#129).

9 Plaintiff filed a motion for declaratory judgment (#131) and a notice of Constitutional Question  
10 (#132) on October 2, 2012. Defendant Stuart filed an opposition to the motion for declaratory judgment  
11 on October 16, 2012. (#133). The court issued an order on October 18, 2012, granting defendant  
12 Bradley's motion to dismiss (#61) *with prejudice*, denying Bradley's motion to strike (#99), granting  
13 the AP Express Defendants and Michelle Pont's motion to strike/dismiss (#69) *with prejudice*, granting  
14 defendant Carranza's motion to dismiss (#72) *with prejudice*, denying plaintiff's motion for entry of  
15 clerk's default (#56), and declining to exercise supplemental jurisdiction over plaintiff's state law claims  
16 against defendants Bradley, Michelle Pont, Jeffrey Pont, AP Express, AP Express Worldwide, and  
17 Carranza. (#134). On October 19, 2012, plaintiff Foley filed a motion to reconsider the court's order  
18 (#134). (#136).

19 The AP Express Defendants filed the instant motion to strike on November 1, 2012. (#139).  
20 Plaintiff filed a second motion for leave to file amended complaint on November 16, 2012. (#140). On  
21 November 19, 2012, plaintiff filed an opposition to the motion to strike (#141), and on November 30,  
22 2012, the AP Express Defendants filed a reply in support of their motion to strike (#144).

## 23 **II. Motion To Strike**

### 24 **A. Arguments**

25 The AP Express Defendants ask this court to strike several exhibits filed by plaintiff, referring  
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to them collectively as the “Pont Divorce Documents:” (1) Michelle's Declaration (Doc. #88, Ex. 2; and Doc. #98, Ex. 1); (2) Gifts Spreadsheet (Doc. #88, Ex. 3; and Doc. #98, Ex. 1); (3) Attorney Declaration (Doc. #98, Ex. 2); (4) Text Messages (Doc. #131-2, Ex. 2); and (5) Forensic Accounting Spreadsheet (Doc. #131-1, Ex. 1). (#139). The AP Express Defendants also ask this court to strike all or portions of plaintiff’s opposition (#141) to the motion to strike. (#144). Each of these documents, except for the plaintiff’s opposition (#141), is attached to either plaintiff’s opposition to defendants’ motion to strike/dismiss complaint (#88), plaintiff’s opposition to defendants’ motion to stay discovery (#98), or plaintiff’s motion for declaratory judgment (#131).

The AP Express defendants assert that these documents should be stricken because (1) they have “no rational bearing on [p]laintiff’s claims,” (2) the documents are not properly authenticated and are not admissible at trial, (3) the documents are immaterial, scandalous, and contain “inappropriate commentary and dramatic flourishes,” (4) the documents prejudice and embarrass defendants, and (5) they negatively reflect on Jeffrey and Michelle Pont’s moral character. (#139). Plaintiff opposed the motion (#139), arguing that the documents should not be stricken, as they are relevant and authentic. (#141).

#### **B. Relevant Law/Discussion**

Pursuant to Federal Rule of Civil Procedure 12(f), “[t]he court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act: (1) on its own; or (2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.” Although the court has discretion when deciding motions to strike, striking a pleading is disfavored, as courts view it as a “drastic measure.” *See Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 973 (9th Cir. 2010) (“We review the district court's decision to strike matter pursuant to Federal Rule of Civil Procedure 12(f) for abuse of discretion.”); *Stanbury Law Firm v. I.R.S.*, 221 F.3d 1059, 1063 (8th Cir. 2000) (“Despite this broad discretion however, striking a party's pleadings is an extreme measure, and, as a result, we have

1 previously held that “[m]otions to strike under Fed .R. Civ. P. 12(f) are viewed with disfavor and are  
 2 infrequently granted.”)(citing *Lunsford v. United States*, 570 F.2d 221, 229 (8th Cir.1977) (citing 5  
 3 Wright & Miller, *Federal Practice and Procedure*: Civil § 1380 at 783 (1969)).

4 Motions to strike apply *only* to pleadings, and courts are unwilling to construe the rule broadly  
 5 and refuse to strike motions, briefs, objections, affidavits, or exhibits attached thereto. *Hrubec v. Nat'l*  
 6 *R.R. Passenger Corp.*, 829 F. Supp. 1502, 1506 (N.D. Ill. 1993)(denying a motion to strike a motion  
 7 and its memorandum in support of that motion, holding that “[n]either of the offending items, however,  
 8 constitutes a pleading.”); *Bd. of Educ. of Evanston Twp. High Sch. Dist. No. 202 v. Admiral Heating*  
 9 *& Ventilation, Inc.*, 94 F.R.D. 300, 304 (N.D. Ill. 1982)(denying a motion to strike when “the offending  
 10 footnote is in a memorandum, not a pleading.”); *Anna Ready Mix, Inc. v. N.E. Pierson Const. Co., Inc.*,  
 11 747 F. Supp. 1299, 1303 (S.D. Ill. 1990)(denying a motion to strike, holding that the “objection is more  
 12 like a memorandum of law than a pleading,” and that “Federal Rule of Civil Procedure 12(f) does not  
 13 authorize this Court to strike those arguments.”); *Lombard v. MCI Telecommunications Corp.*, 13 F.  
 14 Supp. 2d 621, 625 (N.D. Ohio 1998)(denying a motion to strike exhibits attached to an opposition to  
 15 a motion for summary judgment, and holding that the Sixth Circuit has “refused to employ Rule 12(f)  
 16 to strike an affidavit because ‘the rule relates only to pleadings and is inapplicable to other filings.’”).  
 17 “Pleadings,” as defined by the federal rules, include: (1) a complaint; (2) an answer to a complaint; (3)  
 18 an answer to a counterclaim designated as a counterclaim; (4) an answer to a crossclaim; (5) a  
 19 third-party complaint; (6) an answer to a third-party complaint; and (7) if the court orders one, a reply  
 20 to an answer.” Fed. R. Civ. P. 7(a)(1)-(7).

21 The AP Express Defendants recognize Rule 12(f)’s limited application, and state that “Rule  
 22 12(f) contemplates motion[s] to strike pleadings but not motions and other papers...” (#139). The AP  
 23 Express Defendants also assert, however, that “it is well established that a district court may strike a  
 24 party’s submission other than pleadings based upon its ‘inherent power over the administration of its  
 25 business. It has inherent authority to regulate the conduct of attorneys who appear before it [and] to  
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1 promulgate and enforce rules for the management of litigation.” *Id* (citing *Spurlock v. F.B.I.*, 69 F.3d  
 2 1010, 1016 (9th Cir. 1995)). While the court in *Spurlock* did make that finding, that action did not in  
 3 any way involve a motion to strike documents. *Spurlock*, 69 F.3d at 1011. The Ninth Circuit in  
 4 *Spurlock* addressed whether a District Court erred in requiring the Federal Bureau of Investigation (FBI)  
 5 to produce certain documents pursuant to the Freedom of Information Act. *Id*. The FBI argued before  
 6 the Ninth Circuit that the District Court “lacked “inherent” authority to order disclosure of privileged  
 7 executive branch material,” and the Ninth Circuit agreed, supporting its agreement with the quoted  
 8 language above.<sup>1</sup> *Id* at 1016.

9 The AP Express Defendants have not provided legal authority<sup>2</sup> for (and the court has not found  
 10 any) the assertion that courts can use Rule 12(f) to strike documents such as those found here. As the  
 11 documents the AP Express Defendants seek to strike under Rule 12(f) are the plaintiff’s opposition to  
 12 the motion to strike (#141) (or portions thereof) and attachments to either plaintiff’s opposition to  
 13 defendants’ motion to strike/dismiss complaint (#88), plaintiff’s opposition to defendants’ motion to  
 14 stay discovery (#98), or plaintiff’s motion for declaratory judgment (#131), and none of these documents  
 15 constitute a **pleading**, striking these documents is not appropriate. *See* Fed. R. Civ. P. 7(a)(1)-(7) and  
 16 12(f).

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18 <sup>1</sup>The *Spurlock* court cited to *Chambers v. NASCO, Inc.*, 501 U.S. 32, 76, 111 S. Ct. 2123, 2149, 115 L. Ed. 2d  
 19 27 (1991) within the sentence the AP Express Defendants quoted, but that case involved Rule 11 sanctions for frivolous  
 20 and false filings, and did not address the court striking documents. The court in *Spurlock* also cited to *Thomas v. Arn*,  
 21 474 U.S. 140, 155, 106 S. Ct. 466, 475, 88 L. Ed. 2d 435 (1985), but that appeal to the Supreme Court did not relate in  
 any way to striking pleadings or other documents, and dealt with whether “a court of appeals may adopt a rule  
 conditioning appeal, when taken from a district court judgment that adopts a magistrate’s recommendation, upon the  
 filing of objections with the district court identifying those issues on which further review is desired.”

22 <sup>2</sup> The AP Express Defendants cite to *Mazzeo v. Gibbons*, 649 F. Supp. 2d 1182, 1202 (D. Nev. 2009), but the  
 23 court there struck statements and references to attachments contained in the plaintiff’s complaint. Defendants also cite  
 24 to *Pfingston v. Ronan Eng’g Co.*, 284 F.3d 999, 1003 (9th Cir. 2002), where the party argued that a hearsay objection to  
 25 an affidavit attached to a motion for summary judgment was waived because the opponent failed to move to strike the  
 affidavit, and the court ruled that filing an objection to the evidence was sufficient to put the court on notice of the  
 objection. The AP Express Defendants cite to *Allen v. Int’l Tel. & Tel. Corp.*, 164 F.R.D. 489, 491 (D. Ariz. 1995) *aff’d*,  
 111 F.3d 137 (9th Cir. 1997), where the court addressed striking affidavits in light of Rule 56(c)(4)’s admissibility  
 requirements of an affidavit submitted in support of a motion for summary judgment.

1 Accordingly, and for good cause shown,

2 IT IS ORDERED that defendants AP Express, LLC, AP Express Worldwide, LLC, and Jeffery  
3 Pont's Motion to Strike Plaintiff Michael Foley's Inappropriate Court Filings (#139) is DENIED.

4 DATED this 28th day of February, 2013.

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6 **CAM FERENBACH**  
7 **UNITED STATES MAGISTRATE JUDGE**  
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